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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/643,244	08/18/2003	Stephen John Dyks	F3314(C)	3282

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EXAMINER	
BEKKER, KELLY JO	

ART UNIT	PAPER NUMBER
1781	

NOTIFICATION DATE	DELIVERY MODE
06/09/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No.	Applicant(s)	
	10/643,244	DYKS ET AL.	
	Examiner	Art Unit	
	KELLY BEKKER	1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *10 March 2010*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-10 and 13-16* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3-10 and 13-16* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Amendments made 3/10/10 have been entered.
Claims 1, 3-10, and 13-16 are pending.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 16 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 16 recites, "The process according to claim1 wherein the frozen aerated product has an overrun of between 30% and 130% and above 40%." As the term "above 40%" excludes the range of between 30-40%, the limitations of claim 16 appear to conflict with itself; for example, the limitations of claim 16 encompass and exclude 30-50% overrun. Thus, the claim is unclear as it is unknown whether claim 16 intends to include an overrun of 30-40%.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 3-10 and 13-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over) Ezaki (JP App # 60230711) in view of the combination of Hui (ed.) (Dairy Science and Technology Handbook) and Martinez et al (EP 0864256 A2). The references and rejection are incorporated herein and as cited in the office action mailed November 10, 2010.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory

obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3-10, and 13-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as not patentably distinct from claims 1-4 of commonly assigned copending Application No. 11/891,208 ('208). The references and rejection are incorporated herein and as cited in the office action mailed November 10, 2010.

Response to Arguments

Applicant's arguments filed March 10, 2010 have been fully considered but they are not persuasive.

Applicant argues that there is no teaching or suggestion in the reference of the confection being allowed to expand. Applicant's argument is not convincing. When referring to Figure 1, Ezaki teaches that there is a space between the sliding surface and the mold cavities (Page 4 lines 15-20), thus teaching that there is space to allow the confection to expand outside the open cavity. Ezaki teaches that the confection "becomes filled" not only the depressions or molds (Figure 1, 17 and 8), but also the grooves (Figure 1, 26b). Refer specifically to page 9 lines 9-15. Thus, Ezaki teaches that the frozen confection, which includes ice cream, is outside the open cavity prior to the open cavities moving towards one another and closing as recited in claim 1, c and

claim 13, c. Furthermore, applicant claims a frozen aerated confection and discloses ice cream as the frozen aerated confection in the specification; applicant claims that the confection is "allowed" to expand and does not require any steps to provoke or excite the expansion; thus, it would be an inherent property of the confection or ice cream to expand when allowed. Since Ezaki teaches of substantially the same type of confection, i.e. an ice cream, as instantly claimed by applicant and teaches that there is sufficient space for the confection to expand, one of ordinary skill in the art at the time the invention was made would expect the confection as taught by Ezaki to expand outside its open cavity as instantly claimed absent any clear and convincing arguments and/or evidence to the contrary. Applicant is reminded that where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Additionally, water was known as a primary ingredient in frozen confections, including ice creams, and water was known to expand upon freezing, as the ice cream further solidified in the chilled mold as taught by Ezaki in view of Martinez (as would have been obvious, as discussed above), one of ordinary skill in the art would further expect that the confectionary product expand as instantly claimed. It is unclear as to why applicant believes that the product of Ezaki would not expand.

Applicant argues that the teachings of Martinez and Ezaki conflict with one another and there is no motivation to combine. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Ezaki discloses of a method for producing a molded ice cream

product wherein can use heating to assist in removal of the ice cream; Martinez teaches a process for the manufacture of frozen ice confections, including ice creams, in a split molds wherein the molds, i.e. the forming elements, are pre-cooled to below -50C, including below -100C by the use of a cryogenic liquid, typically nitrogen (abstract and page 3 lines 3-12) to allow for ready release of the confectionary product from the mold (page 2 lines 10-21); and as ice cream is a generally frozen or chilled product, it would have been obvious to one of ordinary skill in the art at the time the invention was made to cool the forming elements with liquid nitrogen to below -50C, including -100C in order to keep the confectionary products frozen and allow for easy release of the confectionary product from the mold as taught by Martinez. One would have been further motivated to use liquid nitrogen to cool the forming elements since Martinez teaches that liquid nitrogen is typically used to cool the molds and thus one of ordinary skill in the art at the time the invention was made would expect that the liquid nitrogen be readily available and affordable.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KELLY BEKKER whose telephone number is (571)272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1781

/Kelly Bekker/
Examiner
Art Unit 1781